

57214-8

57214-8

80874-1

No. 57214-8-I

Superior Court # 04-02-23204-1 KNT

**COURT OF APPEALS FOR DIVISION
STATE OF WASHINGTON**

KATHIE COSTANICH,

Respondent,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
FOR THE STATE OF WASHINGTON,

Appellant

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2006 APR 10 PM 4:28

Carol Farr
Attorney for Respondent
WSBA 27470
Law Offices of Leonard W. Moen
1107 SW Grady Way
Renton WA, 98055
(425) 227-4260

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
	A. Errors Assigned to the Superior Court Decision.....	2
	B. Errors Assigned to the DSHS Final Decision	2
	C. Issues Pertaining to the Assignment of Errors	2
III.	STATEMENT OF THE CASE.....	3
	A. CPS Made A Finding That Ms. Costanich Had "Emotionally Abused" The Children In Her Foster Home In December, 2001.....	3
	B. Ms. Costanich Was President Of FPAWS, A Life-Long Advocate For Foster Children And Their Parents, And Provided A Family To The Most Difficult Children In The System, With A Focus On Adolescent Boys With Anger And Aggression.	4
	C. * The ALJ Conducted The Hearing/Investigation, Took Testimony From 49 Witnesses Including All Of The Children's Doctors, Therapists, Counselors, Social Workers, Aides.	5
	D. The ALJ Ruled Against DSHS; The Allegations Were "Unfounded." The Children Were Not Abused But Were "Thriving," Ms. Costanich Had Not Sworn At Them As Alleged Or Done Anything Harmful Or Risky Or Cruel Or Otherwise Prohibited Such That Her License Could Be Revoked. She Just Swore.	8
	E. The ALJ Could Only Rely Upon In-Court Testimony, As The DSHS Reports, Hearsay, Were Not Reliable Evidence.9	9

F.	Ms. Costanich Did Not Use Swearing As Discipline, To Harm, Threaten Or Humiliate	11
G.	The DSHS Review Judge “Reversed” The ALJ’s Initial Decision, Based On His View That The DSHS Reports Were Credible And Accurate After All.	13
H.	Superior Court Reversed The DSHS Decision, Finding It Was Beyond DSHS Review Authority, And In Violation Of The Law And Rules To Such An Extent That The DSHS Final Decision Is Arbitrary And Capricious.....	15
IV.	STANDARDS OF REVIEW:.....	16
A.	The Court Reviews the Superior Court Findings	16
B.	Judicial Review Of Facts Is With The Substantial Evidence Standard	20
C.	The Standard Of Review For DSHS: DSHS Review Authority Is Limited; DSHS Reviews The ALJ’s Findings Of Fact Under The Substantial Evidence Standard.	22
V.	SUMMARY OF ARGUMENT	24
VI.	ARGUMENT.....	25
A.	Issue 1. Superior Court Findings Are Correct: DSHS Ignored The ALJ, Decided That The Same DSHS Reports The ALJ Rejected Are Are Credible And Accurate, That Witnesses Who Disputed The DSHS View Are “Incorrect” Or Unreliable; DSHS Based Its Findings Solely On Uncorroborated DSHS Hearsay And Speculation.....	25
1	DSHS does not challenge any one of the superior court findings, and these are verities on review.	25
2	Finding #2: “The DSHS review judge rejected the ALJ’s findings on the evidence and the facts, on the grounds that the ALJ had not recorded the demeanor of the witnesses.”	26

- 3 Finding #3: "The DSHS review judge analyzed the evidence anew, and determined that hearsay reports submitted by DSHS were credible, although the ALJ had considered these reports and found they could not be relied upon." 27
 - 4 Finding #4: "The DSHS review, relying upon its own view of the evidence, found facts de novo, without regard to the substantial direct evidence supporting the ALJ's findings. DSHS relied upon CPS/DSHS hearsay and speculation to find facts in favor of DSHS, although the allegations were refuted by the direct witnesses." 28
 - 5 Finding # 5: "The DSHS review added new findings inconsistent with the ALJ's decision, in reliance upon CPS/DSHS hearsay." 31
 - 6 Finding # 6: DSHS concluded that the children were abused, that there need be no showing of harm, that words alone were child abuse, that the children must have been harmed, that a "mere risk" of harm is sufficient, that some statements are de facto child abuse, regardless of context, despite DSHS method of risk analysis and the testimony of all of the experts, that this abuse was a basis for revoking her foster care license.31
- B. Issue 2: Superior Court Did Not Err: DSHS Has Violated And Ignored The APA, RCW 34.05, And WAC 388-02, And Abrogated Ms. Costanich's Right To A Fair Hearing On The Evidence By An Unbiased Decision-Maker..... 32
 - C. Issue 3: Superior Court Did Not Err: The DSHS Findings Are Not Supported By Substantial Evidence But Rely Solely On Uncorroborated Hearsay And Speculation; The Evidence Is That Ms. Costanich Did Not Threaten Frank Or Call Anyone Names, Only That She Swore..... 37
 - D. Issue 4: DSHS Has Misinterpreted The Law And DSHS Policy To Decide That Ms. Costanich Guilty Of Child Abuse Based On Speculation, Without Any Showing Of Harm, Or Of Risk To The Children, Or Any Signs In The

D.	Issue 4: DSHS Has Misinterpreted The Law And DSHS Policy To Decide That Ms. Costanich Guilty Of Child Abuse Based On Speculation, Without Any Showing Of Harm, Or Of Risk To The Children, Or Any Signs In The Children's Behavior, Who From All Accounts, Were Not Abused But Were "Thriving."	40
	1 The DSSH review decision misinterpreted the laws and rules governing child abuse and foster care licenses. .	40
	2 Superior court did not err in finding that the DSHS review decision is arbitrary and capricious.	44
E.	Issue 5: Fees: The Court Should Uphold The Superior Court Fee Award And Grant Ms. Costanich Her Fees On Appeal	44
VII.	CONCLUSION	46
VIII.	APPENDIX	47

TABLE OF AUTHORITIES

Cases

<u>Boeing Co. v. Heidy</u> , 147 Wn.2d 78, 87 (2002)	21,34
<u>Bond v. DSHS</u> , 111 Wn. App. 566, 568 (2002)	17
<u>Bowers v. Pollution Control Hearings Bd.</u> , 103 Wn. App. 587, 596, (2000)	44
<u>Callecod v. Wash. State Patrol</u> , 84 Wn. App. 663, 676(1997)	35, 36
<u>Cobra Roofing Serv. v. Dep't of Labor & Indus.</u> , 122 Wn. App. 402, 97 P.3d 17 (2004).....	45
<u>Davis v. Dep't of Labor & Indus.</u> , 94 Wn.2d 119, 124(1980)	21, 34
<u>Deffenbaugh v. Dep't of Soc. & Health Servs.</u> , 53 Wn. App. 868, 871(1989).....	21, 32
<u>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 9, 43 P.3d 4 (2002).	40
<u>Freeburg v. City of Seattle</u> , 71 Wn. App. 367, 371-72 (1993)	20
<u>Morgan v. DSHS</u> , 99 Wn. App. 148, review denied 141 Wn. 2d 1014 (2000)	21, 41, 20
<u>Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n</u> , 99 Wn. App. 96, 101, aff'd, 144 Wn.2d 516, 29 P.3d 689 (2001)	21
<u>Offutt v. United States</u> , 348 U.S. 11, 14 [349 U.S. 133, 137]	46
<u>Ongom v. Dep't of Health</u> , 124 Wn. App. 935, 949 (2005)	20, 33, 36
<u>OPAL v. Adams County</u> , 128 Wn.2d 869, 889(1996).....	46
<u>Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.</u> , 112 Wn.2d 353 (1989)	18
<u>State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce</u> , 65 Wn. App. 614, 619, 829 P.2d 217 (1992)	21.

<u>State v. J.M.</u> , 144 Wn.2d 472, 480, 28 P.3d 720 (2001)	18
<u>State v. Walton</u> , 64 Wn. App. 410, 415-16 (1992)	21, 34
<u>State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n</u> , 91 Wn.2d 48, 586 P.2d 870 (1978).	26
<u>Tapper v. Employment Sec. Dep't.</u> , 122 Wn. 2d 397, 401 (1993).	20, 34
<u>Sinnott v. Skagit Valley College</u> , 49 Wn. App. 878, 886 (1987).	43

Statutes

RCW 4.84.350.....	16, 45
RCW 4.84.350(1).....	45
RCW 26.44.010.....	40
RCW 26.44.020(12)	40
RCW 26.44.020(15)	40
RCW 26.44.020(19)	42, 43
RCW 26.44.030.....	27
RCW 26.44.030(13)	41, 43
RCW 34.05	16, 19, 21, 24, 33
RCW 34.05.070(3)(b)(c)(d)(e)(h)(i).	46
RCW 34.05.461.....	16, 32, 33
RCW 34.05.461(4)	23, 33, 36
RCW 34.05.464.....	16, 22, 32, 33, 34
RCW 34.05.570.....	16, 17, 18, 19, 22, 38

RCW 34.05.570(3)	16, 18, 20, 24
RCW 34.05.570(3)(a).....	47
RCW 34.05.570(3)(c),(d),(e),(h)	32
RCW 34.05.570(3)(i)	44
RCW 34.05.574.....	17, 18, 19
RCW 74.13.031(3).....	40
RCW 74.15.130(2)(a).....	42, 43
RCW 74.15.130(2)(a).....	43

Regulations (As in place in June, 2002)

WAC 388-02.....	21, 22, 24, 33
WAC 388-02-0005.....	21
WAC 388-02-0215(4)	23, 33, 34
WAC 388-02-0220.....	21, 22, 33, 34
WAC 388-02-0390.....	34
WAC 388-02-0215.	23
WAC 388-02-0390.....	23, 37
WAC 388-02-0400.....	23, 34
WAC 388-02-0410.....	37
WAC 388-02-0425.	23, 34, 37
WAC 388-02-0430.....	37

WAC 388-02-0470.....	34, 43
WAC 388-02-0470(4)	23
WAC 388-02-0475.....	34
WAC 388-02-0475(3)	23
WAC 388-02-0490	34
WAC 388-02-0600.....	16, 21, 24, 34
WAC 388-02-0600(2)	35
WAC 388-02-0600(2)(b).....	34
WAC 388-02-0600(2)(e).....	34
WAC 388-148.....	42
WAC 388-148-0470	43
WAC 388-15-073(3)	42, 43
WAC 388-15-077.....	42, 43
WAC 388-15-130	40

DSHS Protocols

Children’s Administration DLR/CPS Investigation Protocol “Investigating Abuse And Neglect In State-Regulated Care,” XIV.B (2)(a)(i),.....	27
Children’s Administration DLR/CPS Investigation Protocol “Investigating Abuse And Neglect In State-Regulated Care” XIII.B.3.d.	31

Court Rules

<u>RAP 1.1</u>	<u>17, 19</u>
<u>RAP 4.1</u>	<u>17, 19</u>
<u>RAP 14.2</u>	<u>45</u>
<u>RAP 18.1</u>	<u>45</u>

I. INTRODUCTION

This is an appellate review of the superior court decision which set aside the DSHS Final Decision that Ms. Costanich had abused the children in her foster home. The Administrative Law Judge ("ALJ"), after hearing from 49 witnesses, ruled against DSHS on all matters. The ALJ determined the children were not "emotionally abused" but were "thriving." Ms. Costanich had not sworn at children as alleged in DSHS reports, and there was no basis to revoke her license. Ms. Costanich swore. This is the ALJ's "Initial Decision" at AR 0224-0247.

DSHS reversed, based on their assessment that the DHSS reports were the most credible evidence after all, the same hearsay reports the ALJ found were unreliable. This is the "DSHS Final Decision" at AR 0001-0080.

Superior Court has reviewed the DSHS Final Decision and ruled against DSHS. Superior court entered the findings of the DSHS violations and errors which mandated relief, in essence, that DSHS had simply ignored the ALJ, which was far beyond the DSH review authority.

Appellant now asks this court to reinstate the DSHS Final Decision, and offers only the same allegations rejected by the ALJ and the superior court.

II. ASSIGNMENT OF ERROR

A. Errors Assigned to the Superior Court Decision

The Superior court did not err.

B. Errors Assigned to the DSHS Final Decision

1. DSHS has decided the credibility and weight of the evidence for itself, has relied on the same DSHS reports the ALJ found unreliable evidence, has relied solely upon its view of the evidence and on uncorroborated hearsay and speculation to reverse the ALJ and find in favor of DSHS.

2. DSHS has thereby side-stepped the law and rules limiting its review authority to deny Ms. Costanich a fair hearing by an unbiased decision-maker; by improperly finding its own facts de novo based on its own view of the credibility the evidence, based on DSHS reports which are uncorroborated hearsay and speculation.

3. DSHS erred in finding facts unsupported by any evidence other than DSHS reports which are uncorroborated hearsay, and on speculation, and by ignoring from 36 fact witnesses.

4. DSHS has misinterpreted the laws and DSHS policy in deciding that speculation to a "mere risk" of harm is an adequate basis to find Ms. Costanich is a child abuser, that injury, substantial risk of injury, and manifestations of abuse in the child's behavior are irrelevant.

C. Issues Pertaining to the Assignment of Errors

1. Did the DSHS review judge ignore the ALJ, rely upon its own view that the DSHS reports were credible and witnesses who disputed these reports were not? YES. Did DSHS make its findings of fact in reliance on the DSHS view, in reliance on the uncorroborated hearsay reports, and speculation, to reverse the ALJ and find that Ms. Costanich must have abused children after all? YES.

2. Did DSHS exceed its authority on review? YES.

3. Are the DSHS findings of fact supported by substantial evidence? NO.

4. May DSHS decide there is child abuse without any sign of injury, any sign of putting a child at risk of injury, without any sign or manifestation of injury in the child? NO. Is casual swearing child abuse or prohibited by the foster care licensing rules? NO

5. Did the Superior Court properly grant fees to Ms. Costanich? YES. Should the Court grant her fees on appeal? YES.

III. STATEMENT OF THE CASE

→ *Note: the facts are seen on the face of the DSHS Final Decision, in light of the ALJ's Initial Decision.*

A. CPS Made A Finding That Ms. Costanich Had "Emotionally Abused" The Children In Her Foster Home In December, 2001.

In July, 2001, Kevin, then 15, told his therapist that his foster mother, Ms. Costanich, had done some improper things¹, that she had a "potty mouth." (AR 0232) ² The children at home were Frank (17), Kevin (15), John (14), Patrick (10), and sisters Elizabeth (9) and Barbara

¹ Kevin reported that Ms. Costanich had called Elizabeth a "cunt," had called Patrick "black ass" and had choked Frank while camping, that she had a "potty mouth." (AR 3393)

² In November, 2001, CPS informed Ms. Costanich there would be a finding of "emotional abuse," and offered to let her keep her two girls² if she would agree not to appeal their finding. (Tr. VII, 57, III, 217) After Ms. Costanich asked to know the allegations, DSHS made an official finding of "emotional abuse," (AR 3347) but refused to allow an evaluation of any child. (AR 3468) When Ms. Costanich requested a hearing, DSHS promptly moved to terminate guardianship of her girls. (AR 03471).

(5). (AR 0226). The boys came in extremely disturbed and angry; Kevin, John and Patrick were SAY³. Elizabeth and Barbie, sisters with organic brain damage from fetal alcohol exposure, arrived at 6 months and 4 days old.⁴ The home had 24 hour supervision, with one or two aides working in the home every day between 7 am and 10 pm. (I, 86).

B. Ms. Costanich Was President Of FPAWS, A Life-Long Advocate For Foster Children And Their Parents, And Provided A Family To The Most Difficult Children In The System, With A Focus On Adolescent Boys With Anger And Aggression.

At the time, Ms. Costanich was president of FPAWS,⁵ a trainer for DSHS – she was a life long advocate for foster children and their parents. (I, 171). She and her husband were renowned in Washington for their skills with the most difficult children in Washington: *“The family provides a unique and valuable resource to our region. Her experience, expertise, commitment and involvement is unsurpassed by any foster home in the state.”* (AR 3522) They were amazingly successful providing a home for very disturbed children, and had focused on violent and sexually aggressive boys in a mix with younger children for the last 15 years.⁶ Per the DSHS placement coordinator, Ms. Costanich was *“beyond compare”*

³ SAY is “sexually aggressive youth.”

⁴ Elizabeth weighed 9 pounds when she arrived

⁵ FPAWS was Foster Parents of Washington State

⁶ Testimony of DSHS staff and others, XVII, 51, 56, XVII, 29, XVI, 64, I, 75, XV, 53, XV, 207, XV, 106. XIV, 7, and see Appendix A.

to any foster parent. Per Dr. Cowles, from Children's Hospital, testified:
"From my point of view and my experience with her, she's one of the best foster parents I've ever worked with." (Tr. VI, 132) See Appendix A for more information on the background of these children, this home, and Ms. Costanich.

In February, when Ms. Costanich saw the allegations against her, she requested an administrative hearing. DSHS alleged that Ms. Costanich had done multiple bad acts, chiefly that she had choked Frank at the lake, had called the girls cunt and bitch, swore all the time at the children, called them profane names, cunt and bitch, and had demeaned and humiliated Patrick with racial slurs, and much more.

C. The ALJ Conducted The Hearing/Investigation, Took Testimony From 49 Witnesses Including All Of The Children's Doctors, Therapists, Counselors, Social Workers, Aides.

The ALJ made a preliminary ruling that "language, alone does not, as a matter of law, constitute cruel and inhumane behavior. Injury and more specifically, emotional injury is relevant." (AR 3236) DSHS took no objection with this ruling. Shortly thereafter, DSHS revoked Ms. Costanich's foster care license, relying on the CPS allegations of abuse. (AR 3236)

The ALJ heard from 49 witnesses and admitted 124 exhibits, in 19 days of hearings. See Appendix B. There were 36 fact witnesses: all of the children's doctors and counselors testified, all of their social workers, all of the aides who worked in the home (some of whom had lived there), two CASAs⁷, many other DSHS social workers who were closely connected to this extended family, and from other DSHS staff, foster parent liaisons, and others who had relevant personal knowledge. See Appendix C for reference. John and Patrick testified, and Kevin, Frank, Elizabeth and Barbie did not testify. (AR 00224)

There was abundant direct evidence that Ms. Costanich swore exactly as she said—as the home had full time aides, every day of the week, plus many regular visitors who observed the children. Aides Hill and Carlson lived in the home at times, and others were there all day, working or just visiting, weekends, evenings. They all agreed that Ms. Costanich used profanity, but not at the children. See Hill, III, 128, Carlson, VII, 100, S. McLaughlin, IX, 91, 99, T. McLaughlin, IX, 153, Barnes, XIV, 52, Robertson, XIV, 175, Cassaday, XV, 75. Some of the aides had grown up with Ms. Costanich, and the McLaughlin sisters have a sister adopted from Ms. Costanich's home. (See S. McLaughlin, XI, 91, Barnes, XIV, 52,

7 CASAs are guardians ad litem, "court appointed special advocates"

Cassaday, XV, 75.) DSHS social workers who had observed how she used profanity around the children and testified she did not call them names, this was just to make a point, and there were no adverse reactions, she did not use profanity as alleged, including DSHS social workers Mayer, who had been in the home regularly since 1994, (XV, 95), and Dr. Carlton (XVII, XVII, 37, 45). Other frequent visitors had never heard Ms. Costanich swear at all to the children. (Ewy, XII, 130, Isley, XV, 200, XV, 143).

DSHS did not allege any injury had occurred, or that there was any sign of injury to the children. AR 0246. DSHS relied upon their allegations of name-calling, saying "black ass," choking Frank at the lake, of calling children names such as cunt and bitch, for their finding of abuse.⁸ (DD XIX, 189) The CPS investigator had not used the DSHS risk tool but her finding of "emotional abuse" was based on her feeling that the children were being "hindered;" she admitted there were no signs of hindering. (Duron, XII, 110) For their revocation, they relied upon the finding of abuse, and harsh discipline, that her language was cruel and

⁸ DSHS did not object to Ms. Costanich's ordinary use of profanity, or that she used it sometimes in speaking to the children. (Duron, XII, 118, 180, 181) DSHS knew she used it as a tool and had determined it was not abusive or prohibited. DSHS admitted there had been no sign of injury. (Duron, XII, 16, 134), that Ms. Costanich did not intend to harm any child. (Duron, XII, 16, 132).

inhumane. (AR 0243). There was no evidence of improper discipline, or cruelty. AR 0246.⁹

D. The ALJ Ruled Against DSHS; The Allegations Were "Unfounded." The Children Were Not Abused But Were "Thriving," Ms. Costanich Had Not Sworn At Them As Alleged Or Done Anything Harmful Or Risky Or Cruel Or Otherwise Prohibited Such That Her License Could Be Revoked. She Just Swore.

The ALJ determined that the DSHS allegations against Ms. Costanich are "unfounded." AR 0247. The children were not abused, but were "thriving" per all of their doctors and therapists. AR 00243, 244, 245. *"All of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment."* AR 0244. *"There were no signs that these children were not gaining in self-esteem or in their ability to relate or communicate with other children. All of those people who were intimately familiar with these children who were the alleged victims all believed that one these children were placed in Ms. Costanich's care they thrived."* AR 0244. Ms. Costanich did not choke Frank, or injure him in any fashion. AR 0227. She did not use

⁹ The discipline in this home was geared to the child's age and needs; he rules were simple and the expectations were clear; response was helpful, immediate and interactive. (Mayer, XV, 86) Older children might have to read to the younger children, copy a page from the encyclopedia, or do a chore, dig a flower bed. Bad trouble was loss of privileges such as video games, or TV. (S. McL, IX, 143, Costanich, I, 2, J, II, 110, 116, P, II, 52, Hill, III, 180, 195, Carlson, II, 100, T. McLaughlin, IX, 165, Barnes, XIV, 49, Robertson, XIV, 155, Cassaday-Smith, XV, 47).

racial slurs – the one day she said “black ass” to Patrick she was parroting Rosetta Robertson, the African American aide who had told Patrick that this is what her mother would have said to her.¹⁰ (AR 00229) Ms. Costanich did swear, but “she never used the language at a child.” AR 0232. Patrick was happy and thriving, he enjoyed being a child. AR 0236. John was bonded and nurtured by Ms. Costanich’s affection, very caring with the younger children; he enjoyed being a big brother. AR 0236. Kevin’s own declaration states that this is a loving home, that he was cared for the first and only time in his life. AR 0238. This finding is supported by all of the testimony from those who knew the children.¹¹

E. The ALJ Could Only Rely Upon In-Court Testimony, As The DSHS Reports, Hearsay, Were Not Reliable Evidence.

¹⁰ Rosetta, who is herself African American, told P this is what her mother would have told her (Robertson, XIV, 146). Ms. Costanich said something like “See, Patrick, I’m your mama, get your black ass over there.” (Costanich, XVII, 67). Ms. Costanich did not do this to shame P. (Robertson, XIV, 146, 147), and P was smiling over this. (Mayer, XV, 121)

¹¹ For examples, Patrick was happy, cheerful, with growing self-esteem. (Thames, III, 25, 26, 32). John had never done this well, he was completely stabilized, doing the best he had ever seen: John was happy, cheerful, caring, had more self-esteem. (Dr. Cowles, VI, 127, 128, 131, 140, 145.) This was the best home Kevin had ever had, Kevin showed great improvement and significant emotional growth, he was happier, he had formerly been depressed or suicidal, he was not being abused in this home. (Behar, V, 82, 129, Crabb, IX, 48, 49, 34, 56, 62). Frank felt safe in this home; he had done wonderful and had blossomed into a great child. (Akroyd, 235, Isley, XV, 194.). Barbara and Elizabeth were happy, joyful, and full of life and personality (Hill, III, 189, S. McLaughlin, XI, 135). Barbara was bouncy, outgoing, and giggly, Elizabeth was delightful and the Costaniches’ nurturing was the reason for their success. (Dr. Vincent, IX, 30, 36, 44, 76).

The ALJ determined he could not rely on hearsay, but could only rely upon in-court testimony. AR 0240, 0023. The ALJ determined that the CPS investigator's reports were unreliable: there were many challenges to her credibility and the accuracy of her interviews¹² and as there was no opportunity to rebut her reports. AR 0240. In the hearings, the CPS investigator testified she had never interviewed Kevin or his counselor, or any of the children's doctors, counselors, or social workers, and admitted to lying about this in a prior declaration:¹³ a copy of this declaration, AR 03471, with false statements referenced to her testimony,

¹² The ALJ also knew that there were no witnesses to her interviews with children. She claimed "near-verbatim" notes but no notes were produced. She testified she destroyed them, which is contrary to DSHS policy Children's Administration DLR/CPS Investigation Protocol "Investigating Abuse And Neglect In State-Regulated Care," XIV.B (2)(a) (ii). She interviews she had allegedly conducted in 10/01 were not in the file in 7/02 (XIII, 104). She testified she did not use the DSHS Risk Factor Matrix (RFM), the tool DSHS uses to evaluate risk, to determine if an allegation of abuse is founded. (XII, 228) Had she used the RFM, the risk would not be not "5" but "0" and "1." (XIII, 10). She testified the allegation was "founded" because it was founded. (XIII, 227).

¹³ The CPS investigator had actually interviewed none of the children's doctors/therapists, or even their social workers, and had lied about this in an earlier declaration in which she stated she had interviewed the children, several of their social workers, the foster parents, the aides who were working in the home in 2001, two licensors, Dr. Cartwright, several family friends and two therapists. (03471). In testimony, she admitted these statements were false: she had not interviewed Kevin (XII, 158, 27), she had not interviewed any of the children's social workers (XII, 192, 195, 148, 149, 110, 111), she had not interviewed the foster father (XII, 106), she had not interviewed the aides in the home in 2001 (XII, 197, 204),¹³ she had interviewed none of doctors or social worker, no professional in the children's lives (XII, 100, 111, XII, 176, XII, 136, 145, 157). She admitted she misrepresented the statement of Dr. Vincent, who was the girls' psychiatrist (XII, 198). She also admitted that the quote she put in her declaration was not true — no aide had told her that Ms. Costanich swore at the children. (XII, 99, 107, 217, 101). Dr. Cartwright, the psychologist Duron referenced in her declaration as a person she had interviewed, was actually the DSHS expert, and had never met any of the children, but had only reviewed records provided by Duron. (00234, IV, 88).

was reviewed by the superior court, and ¹⁴ and is attached as Exhibit D. Frank, Kevin, Elizabeth, and Barbie, did not testify, but John and Patrick did.¹⁵ (AR 0224) The parties stipulated to the admission of Kevin's declaration with the understanding that Ms. Costanich would be able to challenge Kevin's credibility through his counselor, Mr. Crabb. AR 00237, AR 0232, Tr. I, 64, and IX, 57, 58. The ALJ determined that Kevin's statements were not reliable.¹⁶ AR 0238, 0232. The ALJ relied upon in-court testimony and the opinions of the DSHS experts. AR 00233-237.

F. Ms. Costanich Did Not Use Swearing As Discipline, To Harm, Threaten Or Humiliate

The ALJ found that Ms. Costanich did not direct her swearing at the children as alleged. (AR 0246) She did use profanity,¹⁷ but this was

¹⁴ This was an exhibit from Ms. Costanich's "Memo to the Court" of 6/22/05

¹⁵ The DSHS Final Decision refers to the children as F, K, J, P, E, B.

¹⁶ Mr. Crabb was suspicious about Kevin's allegations because of the timing and the circumstances; Kevin had changed his story, Kevin had a motive to lie, ¹⁶ a history of untruthfulness. (Crabb, IX, 22). Kevin does not always tell the truth, and had difficulty being honest (Crabb, IX, 22, 63, Behar, V, 114) Kevin had changed his initial story when Crabb questioned him, and had made no such prior complaints about the Costanich home. (Crabb, IX, 65, 66, Behar, V, 109). Kevin had filed a false referral in the past. (CPS/Duran, XII, 102, 103).

¹⁷ The evidence from those who had heard her swear was that it was casual, not offensive, it was not done in anger, or to discipline, or to belittle or intimidate, but it was casual, funny, directed at the air, used as an adjective to make a point, and generally used only around adults; it was occasional, not excessive or offensive. (Hill, III, 131, 162, 184, Carlson, VII, 103, S. McLaughlin, IX, 97, 98, 152, L. Nelson, XIV, 14, Barnes, XIV, 52, Robertson, XIV, 175, Cassaday-Smith, XV, 50, 51, 75, 77, T. McLaughlin, IX, 193,

all of the direct testimony, the testimony of all of the adult witnesses. (Initial Order, AR 0230, 0232, 0246) ¹⁸ Ms. Costanich did not dispute that she swore but she used profanity casually, to make a point, to emphasize, as a tool, to take the shock out of words. This was the evidence, that she used profanity in sentences, not to name call or demean, and her profanity was harmless. (Hill, III, 131, 162, 184, Carlson, VII, 103, S. McLaughlin, IX, 97, 98, 152, L. Nelson, XIV, 14, Barnes, XIV, 52, Robertson, XIV, 175, Cassaday-Smith, XV, 50, 51, 75, 77, T. McLaughlin, IX, 193, Mayer, XV, 96, Ewy, XII, 130, Yarkowsky, XV, 141, Isley, XV, 200, 231, Carlton, XVII, 31, Minear, XVI, 189, Spier XVII, 64, P 62, Graham, III, 203, Stephenson, IV, 167. Mayer, XV, 118, Patrick, III, 62) The ALJ concluded there was no child abuse, where these children were

Mayer, XV, 96, Ewy, XII, 130, Yarkowsky, XV, 141, Isley, XV, 200, 231, Carlton, XVII, 31, Minear, XVI, 189, Spier XVII, 64, P 62, Graham, III, 203, Stephenson, IV, 167. Mayer, XV, 118). She did not call the children names, but used swear words in sentences, and not to the girls. (Patrick, III, 62)

¹⁸ The ALJ's finding reflects the evidence. The children's aides were in the home whenever the children were present, and they all testified that Kathie treated the children with respect. Kathie was the only one allowed to use profanity, and the children sometimes heard her. Kathie did not ever swear at a child, or use threats or intimidation or call the children profane or bad names. (Hill, III, 128, 175, 184, 195, Carlson, VII, 100, 103, S. McLaughlin, IX, 97, 98, 117, 126, 152, T. McLaughlin, IX, 163, Barnes, XIV, 52, Robertson, XIV, 174, 175, Cassaday-Smith, XV, 50, 51, 75, 77). Beyond the aides, the many other witnesses who spent considerable time in the home testified to the same. (DSHS' Mayer, XV, 96, DSHS' Carlton, XVII, 31, CASA Yarkowsky, XV, 141, CASA Isley, XV, 200, 231, Minear, XVI, 189). In addition, E told her social worker that Ms. Costanich did not do what was alleged. (Hunter, XVI, 53) K's therapist testified that K was not called any names. (Crabb, IX, 79) J's therapist testified that if someone were cursing J, he would have been falling apart, but he was happy, bonded, caring. (Cowles, VI, 139).

thriving by all accounts, where there was no risk of injury, no sign of injury, and no evidence that Ms. Costanich's swearing was cruel or harsh discipline forbidden by the WAC. AR 0232, AR 0246, 0247.

G. The DSHS Review Judge "Reversed" The ALJ's Initial Decision, Based On His View That The DSHS Reports Were Credible And Accurate After All.

The DSHS Final Decision relies upon the exact same hearsay the ALJ rejected. The DSHS review judge decided he was not bound to the ALJ's rulings on the evidence, and that the DSHS hearsay was credible and accurate, that Kevin was "*not lying*." (AR 0023, AR 0028) Based solely upon his view of the credibility and weight of the DSHS hearsay reports, the DSHS review judge found his own facts: Ms. Costanich had threatened to kill Frank at the lake, she called the children names, including "bastard," "cunt," and "bitch," said "fuck you" to them, had said "black ass" to Patrick several times, that she did this deliberately to threaten and humiliate them. (AR 0080)

The DSHS review judge determined it was his job to analyze the evidence for himself: "Because the ALJ failed to record observations about the demeanor of other witnesses, the undersigned cannot defer to the ALJ's observations." (AR 0015) The DSHS review judge evaluated the hearsay statements and relied upon them: "the statements of the children

must be evaluated on a case by case basis....” AR 0024-0049, AR 0042. He relied upon the CPS hearsay to corroborate itself. AR 0035, AR 0025, 0042. For some example, “*K and F gave virtually identical accounts of the Appellant’s statement at the lake.*” AR 0034. He relied primarily upon hearsay attributed to the children who did not testify, F, K, E, to make his own findings, as seen on pages AR 0041, 0042, 0032, 0033, 0039, 0040, 0052. He ignored the evidence of the witnesses and the experts. For instance, witnesses who disputed the CPS accounts of their interviews were irrelevant, AR 0020-0022; the adult witnesses to the lake incident were simply wrong. AR 0035 (“*Ms. McLaughlin’s account is obviously incorrect...*”¹⁹ and “*Ms. Ewy’s testimony is obviously incorrect.*”) AR 0060, 0061, AR 0236. He gave DSHS expert opinion little weight,²⁰ and the expert on fetal alcohol syndrome even less. . AR 0042, 0060, 0235, 0025. He relied primarily upon hearsay attributed to the children who did not testify, F, K, E, to make his own findings. AR 0041, 0042, 0032, 0033, 0039, 0040, 0052.

The DSHS review judge’s conclusions rely upon his speculation about how the children probably felt, and what Ms. Costanich probably

19 The ALJ found Ms. McLaughlin very credible. AR 0240

20 DSHS reasoning on this is circular: even though the DSHS experts did not conclude child abuse, they had mistakenly relied upon DSHS allegations of verbal AND physical abuse, and they might have changed their opinions if they knew that the physical abuse allegations were unfounded. (AR 0060, 0061) This makes absolutely no sense.

did. AR 0063, AR 0064, AR 0066. DSHS concluded that a “*mere risk*” of injury is sufficient to prove abuse regardless of any actual harm to the child. AR 0058. DSHS concluded that the children’s behavior is not an indicator of emotional abuse, that the risk of harm is determined by examining the alleged abusive act itself. AR 0060, 0064.

H. Superior Court Reversed The DSHS Decision, Finding It Was Beyond DSHS Review Authority, And In Violation Of The Law And Rules To Such An Extent That The DSHS Final Decision Is Arbitrary And Capricious.

Superior court reviewed the pleadings, conducted three hearings, and reviewed the entire record. Superior Court ruled against DSHS. The superior court did not make findings on the facts below, but confirmed that “the ALJ found that Ms. Costanich did not swear at the children, that the children were not harmed or at risk of harm, but were ‘thriving,’ and that the allegation of emotional abuse was unfounded and that there was no basis to revoke Ms. Costanich’s foster care license.” (Finding # 1) ²¹

The superior court made findings of fact setting out the DSHS errors and violations: that DSHS had violated the APA, had ignored the ALJ, had decided that DSHS hearsay reports were credible and accurate after all, had substituted this view of the evidence to find new facts, had

²¹ (The superior court judge noted that he would have found that Ms. Costanich did swear at the children occasionally, but that even if so, under the entire record, it was inappropriate to revoke her license.)

relied upon uncorroborated hearsay and speculation. The court entered separate Findings of Fact and Conclusions of Law under a separate order, fully presented in the first part of the argument section of this brief.

Superior court applied the review provisions of RCW 34.05.570(3) and concluded that DSHS had thus erred and violated the APA, CW 34.05.464, WAC 388-02-0600²², RCW 34.05.461. Superior Court applied RCW 34.05.570(3) concluded that the DSHS Final Decision was unlawful procedure and decision-making, a misapplication of law, not supported by the evidence, and inconsistent with DSHS rules. Superior Court concluded that the DSHS Final Decision was "deliberate, arbitrary and capricious," found that DSHS was not substantially justified in pursuing this finding, and awarded Ms. Costanich the maximum \$25,000 fees under RCW 4.84.350.

IV. STANDARDS OF REVIEW:

A. The Court Reviews the Superior Court Findings

The appellate court reviews the superior court's Decision, as superior court has already conducted the judicial and properly set out the findings of the errors and violations in the DSHS Final Decision.

²² All cites to WAC 388-02 refer to the WACS as encoded in April of 2002, in place as these hearings began

Superior court has already conducted the judicial review authorized by RCW 34.05.570, and has made the findings of fact setting out the errors and violations in the DSHS Final Decision mandated by RCW 34.05.574. Superior court properly did not make findings on the facts below, but on the illegality of the DHSS review decision, pursuant to RCW 34.05.570. It is these findings that are reviewed.

RAP 1.1 provides for either a review of a trial court decision and or direct review of an administrative decision with permission only. RAP 1.1, 4.1. The Court of Appeals conducts a direct review when the superior court has done the judicial review and affirmed an agency decision. Bond v. DSHS, 111 Wn. App. 566, 568 (2002). In those cases, there are no superior court findings of violation and error for this court review.

On a direct review, the appellate court applies RCW 34.05.570 and 34.05.574, just as the superior court has already.. The reviewing court must determine if the DSHS review decision is proper, legal, and within its authority. The reviewing court “**shall grant relief**” from an agency order in an adjudicative proceeding only if it determines that: (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; (c) The agency has engaged in unlawful procedure or

decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (i) The order is arbitrary or capricious. RCW 34.05.570 (3). The court reviews the entire record. Providence Hosp. of Everett v. Dep't of Soc. & Health Servs., 112 Wn.2d 353 (Wash. 1989) If such errors are found, the reviewing court may set aside the DSHS Final Decision, and must enter findings:

"The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order."

RCW 34.05.464. This is exactly what superior court has already done, it these superior court findings which are reviewed. For what other purpose are these findings? The court must give effect to the plain meaning of the statute. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The only way to give this statute meaning is that the findings are set out for

appellate review. Otherwise, there is no purpose for the authority in the superior court, RCW 34.05.571, and no purpose for the findings mandated by 34.05.574. If the appellate court is always to conduct a direct review of an agency decision, the distinction in RAP 1.1 and the permission required by RAP 4.1 makes no sense, and the review by the superior court is pointless and wasted effort, surely not the intent of the legislature.

The APA, the Administrative Procedure Act, RCW 34.05, is the citizen's guarantee of a fair hearing on the evidence by an unbiased tribunal, and the duplicate review of an agency decision only makes sense when the superior court has affirmed the agency against a citizen, to doubly guarantee that the decision is unbiased and fair. In this case, where the superior court has upheld the independent decision by the ALJ and ruled against DSHS, there is no appearance of bias.

To guarantee the fair hearing, it is the ALJ conducts the hearing, admits the evidence, determines its weight and credibility, and finds the facts; the DSHS agency review is limited to changing errors in law or facts if not supported by substantial evidence; judicial review DSHS decision is to ensure that DSHS has not stepped beyond its review authority. → See attached chart which provides an overview of the APA and the WAC governing review of administrative orders, Appendix E .

The Tapper case, cited by Appellant as authority for another second direct review, does not apply here. Tapper v. Employment Sec. Dep't. 122 Wn. 2d 397, 401 (1993). In Tapper, the superior court affirmed the agency decision, there were no superior court findings of agency error and violations, as there are here.

→ *It will not matter whether the court reviews the superior court findings or the DSHS Final Decision, the results will be the same*

B. Judicial Review Of Facts Is With The Substantial Evidence Standard

The court conducting the judicial review, whether superior court or the appellate court, reviews the facts in the light most favorable to Ms. Costanich. RCW 34.05.570(3), Morgan v. DSHS, 99 WN App. 148 (2000). This standard requires the court to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." Ongom v. Dep't of Health, 124 Wn. App. 935, 949 (Wash. Ct. App. 2005), citing Freeburg v. City of Seattle, 71 Wn. App. 367, 371- 72, 859 P.2d 610 (1993) (quoting State ex

rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 619, 829 P.2d 217 (1992)).

The ALJ was the fact-finder, and the reviewing court must view the evidence in a light most favorable to her. It is sole province of the fact-finder, in this case the ALJ, to pass on the weight and credibility of evidence. Boeing Co. v. Heidy, 147 Wn.2d 78 (2002), citing . Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980) (questions of credibility are for trier of fact and are not overturned on appeal); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (trier of fact's function is to weigh persuasiveness of evidence). Boeing Co. v. Heidy, 147 Wn.2d 78, 87 (Wash. 2002). An appellate court does not substitute its own judgment for that of an administrative tribunal on questions of fact. Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n, 99 Wn. App. 96, 101, 994 P.2d 216 (1999), *aff'd*, 144 Wn.2d 516, 29 P.3d 689 (2001). The tribunal was the administrative hearing, and it is the ALJ to whom reviewing courts defer.

The DSHS review judge is not a second fact-finder, but has limited authority to review and modify an ALJ's decision, per RCW 34.05 and WAC 38-02, which are the DSHS hearing rules. The DSHS review judge is bound by the DSHS hearing rules in WAC 388-02. WAC 388-02-0005, 0220, -0600. Deffenbaugh v. Dep't of Soc. & Health Servs., 53

Wn. App. 868, 871 (1989). DSHS would have the same authority as the ALJ when presiding at the hearing. WAC 388-02-0220

Appellant's reliance on the Tapper case, as authority for the DSHS review judge being the relevant fact-finder, is misplaced. Tapper, supra. The Tapper case is not a DSHS case, it is an employment case, it is not governed by WAC 388-02, the DSHS hearing rules. Those rules clarify that it is the ALJ who determines the weight and credibility of the evidence.

C. The Standard Of Review For DSHS: DSHS Review Authority Is Limited; DSHS Reviews The ALJ's Findings Of Fact Under The Substantial Evidence Standard.

DSHS review of an ALJ's initial decision is limited, and governed by RCW 34.05.570 and WAC 388-02, , the DSHS hearing rules. It is the ALJ who is the hearing officer, the unbiased professional judge who conducts the hearings, admits the evidence, observes the witnesses, who determines the credibility and weight of the evidence. The DSHS review judge must give due regard to the ALJ's opportunity to observe the witnesses in every type of case, whether child abuse findings or a licensing case. RCW 34.05.464. It is the ALJ who is the fact finder – it is not for a review court to judge the credibility of witnesses or the weight

to be given conflicting evidence. Ongom v. Dep't of Health, 124 Wn. App. 935, 949 (Wash. Ct. App. 2005), citations omitted. This level of regard is unambiguously stated in the WAC: "Testimony given with the opportunity for cross-examination by the other parties may be given more weight **by the ALJ.**" WAC 388-02-0390. "**The ALJ** determines whether the evidence is admitted and what weight (importance) to give it." WAC 388-02-0400. "**The ALJ decides...** and also determines the weight (importance) of the evidence." WAC 388-02-0425. "**The ALJ** may admit and consider hearsay evidence... The ALJ may only base a finding on hearsay if the ALJ finds that the parties had the opportunity to question or contradict it." WAC 388-02-0475(3) "**The ALJ** decides a) what evidence is more credible if evidence conflicts, and b) the weight given to the evidence." WAC 388-02-0470(4). **It is the ALJ** who decides whether it would violate a party's right to rely on uncorroborated hearsay: "Findings of fact must be based exclusively on the evidence of record in the adjudicative proceeding, and may not be based on hearsay unless **the presiding officer** determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence." RCW 34.05.461(4) The DSHS review judge would have this same authority if presiding at the hearing. WAC 8-02-0215.

DSHS/CPS review on a case of CPS findings of child abuse are further limited: DSHS review of facts is limited to the substantial evidence test WAC 388-02-0600. DSHS may not change the ALJ's decision findings of fact unless ".....(b) The findings of fact are not supported by substantial evidence based on the entire record; (e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record." WAC 388-02-0600. The substantial evidence standard does not permit DSHS to substitute its judgment for that of the trier of fact on the credibility of witnesses or the weight to be given to conflicting evidence. Callecod v. Wash. State Patrol, 84 Wn. App. 663, 676 (Wash. Ct. App. 1997)

V. SUMMARY OF ARGUMENT

Superior Court did not err in reversing this decision, as mandated by RCW 34.05.570(3). DSHS has essentially side-stepped the APA, RCW 34.05, the DSHS hearing rules, WAC 388-02, and other laws and rules, and stepped on Ms. Costanich's right to a fair hearing by an unbiased decision-maker. . DSHS violated its authority by finding facts de novo

based on the DSHS view of the credibility of the evidence; by finding facts supported only by DSHS hearsay evidence the ALJ deemed unreliable; by relying on uncorroborated hearsay and speculation, by misinterpreting the law. If DSHS can so disregard the ALJ and the evidence, the laws and the rules, the entire administrative hearing process is meaningless.

Ms. Costanich did not swear at the children as alleged. She did not call children names. She just swore. Swearing is not prohibited.

→ The court can determine superior court was correct by reviewing the DSHS Final Decision, in light of the ALJ's initial decision.

VI. ARGUMENT

A. Issue 1. Superior Court Findings Are Correct: DSHS Ignored The ALJ, Decided That The Same DSHS Reports The ALJ Rejected Are Are Credible And Accurate, That Witnesses Who Disputed The DSHS View Are "Incorrect" Or Unreliable; DSHS Based Its Findings Solely On Uncorroborated DSHS Hearsay And Speculation.

1 DSHS does not challenge any one of the superior court findings, and these are verities on review.

Appellant's brief did not challenge the superior court's findings.

Therefore, the superior court findings have become the established facts of

the case. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 586 P.2d 870 (1978). Appellant's brief makes claims that were not before the ALJ. For instance, claims of harm: the CPS investigator testified there had been no sign of injury, that she did not believe that Ms. Costanich intended to hurt any child. (Duron, XII, 16, 132, 134). She testified to no evidence of harm but believed that Ms. Costanich was "hindering" the children's development – she also admitted there was no evidence of hindering. (Duron, XII, 110) She conceded that Kevin was not abused Duron, XII, 117, 119. There was no mention of Ms. Costanich failing to file her disciplinary rules. Appellant can not raise these claims now, three courts later.

2 Finding #2: "The DSHS review judge rejected the ALJ's findings on the evidence and the facts, on the grounds that the ALJ had not recorded the demeanor of the witnesses."

The DSHS review judge made this statement: "Because the ALJ failed to record observations about the demeanor of other witnesses, the undersigned cannot defer to the ALJ's observations." (AR 0015) The "ALJ was virtually silent about his observations." (AR 0014). The ALJ was not silent, but wrote 4 pages about the credibility and reliability of the evidence, including noting the demeanor of S. McLaughlin, whom he found very credible, one of many who disputed the CPS investigator's

reports. AR 00237-00240. This superior court finding is supported by the evidence.

3 Finding #3: “The DSHS review judge analyzed the evidence anew, and determined that hearsay reports submitted by DSHS were credible, although the ALJ had considered these reports and found they could not be relied upon.”

The DSHS review judge decided the credibility and weight to be give the CPS/DSHS reports, Kevin’s declaration, and witnesses, for himself. AR 0019-0030. For examples, *“the Appellant has not proven that Ms. Duron’s notes are inherently unreliable,”* *“the undersigned must evaluate each statement by considering each individual child’s history...”* AR 0021-0025. The DSHS review judge analyzed these statements on the following pages. The DSHS review judge granted unvarnished credibility to the CPS investigator and 100% accuracy to her reports of her alleged interviews with children, in spite of the ALJ and the evidence²³: *“Ms. Duron has removed the element of subjectivity from her interviews with children...”* AR 0022. *“..the undersigned presumes that the statements of the children reported in Ms. Duron’s near-verbatim notes are the words of the children rather than the interpretation or summary of Ms. Duron.”* AR 0023.

²³ The CPS investigator’s alleged interviews were unobserved, and Ms. Duron had discarded any notes of those interviews, contrary to law and DSHS policy. RCW 26.44.030, WAC 388-15-021(5), Children’s Administration DLR/CPS Investigation Protocol “Investigating Abuse And Neglect In State-Regulated Care,” XIV.B (2)(a)(i).

The DSHS review judge decided that the CPS hearsay corroborated itself, if it was attributed to two children. AR 0034, AR 0033, 0035. He decided that Kevin was “*not lying*.” (AR 0028, 0033). He decided that witnesses who did not support his view of the evidence were incorrect or unreliable, for instance, witnesses Hill and S. McLaughlin²⁴ were “obviously mistaken,” S. McLaughlin and Ewy were “obviously incorrect.” AR 0035, 0039. He decided that witnesses who disputed Duron’s reports of their own interviews were insignificant, that Duron’s totally false statement was just a little error. AR 0019-21, 0033-0039. He decided that DSHS experts were not reliable,²⁵ although the ALJ had relied upon them. AR 0060, AR 0235-237. He decided that the expert on fetal alcohol syndrome was entitled to no weight. AR 0025. This superior court finding is supported by the evidence.

4 Finding #4: “The DSHS review, relying upon its own view of the evidence, found facts de novo, without regard to the substantial direct evidence supporting the ALJ’s findings. DSHS relied upon CPS/DSHS hearsay and speculation to find facts in favor of DSHS, although the allegations were refuted by the direct witnesses.”

²⁴ The ALJ found S. McLaughlin particularly credible and recorded her demeanour. AR 0239-0240.

²⁵ DSHS reasoning on this is circular: even though the DSHS experts did not conclude child abuse, they had mistakenly relied upon DSHS allegations of verbal AND physical abuse, and they might have changed their opinions if they knew that the physical abuse allegations were unfounded. (AR 0060, 0061) This makes absolutely no sense.

The DSHS review judge stated that he did a de novo review of the facts. AR 0079. That the DSHS decision relies solely upon DSHS reports is seen in the references to exhibits ("D- xx"). It particularly relies upon statements attributed to Frank, Kevin, Elizabeth, (F, K, E), who did not testify. See reliance upon K on page AR 0004, 0034, on F and K on page 0035, on F and E on page AR 0041-42. He relied upon hearsay attributed to K and F to find that Ms. Costanich threatened to kill F and call him a bastard, because the witnesses were "obviously incorrect," and because Ms. Costanich could not remember what she said.²⁶ AR 0035. He found that Ms. Costanich said "cunt" in reliance on three children, in spite of the fact that no witness had ever heard this, including the two children who testified: *"If the Appellant had been using the word cunt around the children, one would expect that J and P would recognize this word,"* and *"the fact that no adult witness heard the Appellant say the word cunt is significant."* AR 0009, 0041, 0042. He relied upon "three children" to find that Ms. Costanich said "fuck you" and noted that this was disputed by every witness. AR 0052. He relied on "four different children" to find

²⁶ Frank was choking Sarah when Ms. Costanich pulled him off, and Sarah testified Ms. Costanich did not say this. (Tr. IX, 105). Ms. Costanich testified she probably told him to get "his frigging hands off her, or whatever." (Tr. I, 110). Ewy, who was there, heard no threats. (Tr. I, p 110 XIII, 135)

that Ms. Costanich called Elizabeth a bitch. He decided that the witnesses who said this was not true were “obviously mistaken.” AR 0039.

SPECULATION. The DSHS review found that Ms. Costanich’s statement to Frank was menacing because Frank had “likely” heard it that way, and disrespectful because Frank was “probably aware that...” AR 0063-64. What F heard and felt was pure speculation – the witnesses testified that Ms. Costanich never made the statement. (Ms. Costanich, I, 110, S. McLaughlin, IX, 105, Ewy, XIII, 135) DSHS found that Patrick “must have” felt belittled by hearing “black ass” in complete disregard for the ALJ’s findings and the evidence.²⁷ AR 0065-0066, AR 0229-0233, 0236. The DSHS review judge decided for himself what constitutes child abuse: *“it should be self evident that a parent-figure’s threat to kill a child is potentially devastating to the child’s mental health...,”* and *“...some actions are so perilous that they do not require an expert to point out the obvious,”* and *“... this statement is the kind of statement that will always pose a serious danger”* AR 0064.

²⁷ P was smiling about this one-time incident. Tr. III, 51, P was smiling about this incident, which Plaintiff said happened one time. (Mayer, XV, 121, Tr. III, 51) P was comfortable and happy, with improved self-esteem, and he did not feel ill-treated for his skin. (III, 11, 25, 26, P, III, 47, 51, 62, III 6) When he had to leave, he wanted to go back to Ms. Costanich’s on weekends. (Thames, III, 25, Brown, XIV, 113). P’s therapist reported that P talked about events in the home, comfortable, happy, he loved Ms. Costanich. (Brown, XIV, 103, 106, 113, 115).

5 Finding # 5: “The DSHS review added new findings inconsistent with the ALJ’s decision, in reliance upon CPS/DSHS hearsay.”

The DSHS review judge added the new finding that Ms. Costanich threatened to kill Frank and called him a bastard, solely in reliance upon statements attributed to Frank and Kevin. (AR 0004). The finding is not consistent or with the ALJ’s overall ruling.

6 Finding # 6: DSHS concluded that the children were abused, that there need be no showing of harm, that words alone were child abuse, that the children must have been harmed, that a “mere risk” of harm is sufficient, that some statements are de facto child abuse, regardless of context, despite DSHS method of risk analysis and the testimony of all of the experts, that this abuse was a basis for revoking her foster care license.

DSHS made these statements on pages AR 0058, 0079, 0080. For instance, “The behavior of the children in this case does not determine whether the Appellant’s acts constituted abuse....” AR 0058. And, “a mere risk of injury is sufficient to prove abuse regardless of any actual harm to the child.” AR 0019, 0058, 0064) DSHS uses a risk factor matrix to determine if a child is abused.²⁸ The CPS investigator testified

²⁸ RCW 26.44.030(13), Children’s Administration DLR/CPS Investigation Protocol “Investigating Abuse And Neglect In State-Regulated Care,” XIII.B.3.d. DSHS uses the Risk Factor Matrix (RFM) to determine abuse/ risk of abuse. Duron, IV, 228, Bulzomi, XVII, 105, L. Nelson, XIV, 17, and others. DSHS measures whether an act is abusive by signs of injury. (Duron, XII, 219,.) Emotional abuse is measured by the

she had not used the DSHS risk factor matrix, but relied upon her feeling that the children's growth was being "hindered" but admitted there were no signs of hindering. (Duron, XII, 110, 221) An evaluation is also DSHS procedure.²⁹ The DSHS experts, and the doctors, testified that there would be signs in the children's behavior, and a child would need to be evaluated. AR 023, VI, 186. There were no signs. AR 0244.

B. Issue 2: Superior Court Did Not Err: DSHS Has Violated And Ignored The APA, RCW 34.05, And WAC 388-02, And Abrogated Ms. Costanich's Right To A Fair Hearing On The Evidence By An Unbiased Decision-Maker.

Based on these findings of DSHS errors and violations, superior court properly concluded that the DSHS has engaged in improper and unlawful decision-making, had improperly interpreted the law, made findings of fact based upon unreliable and uncorroborated speculation, and in violation of DSHS rules, in violation of the laws and rules, including RCW 34.05.464, RCW 34.05.461, WAC 388-02-0600, 388-02-0220, and was mandated to grant relief under RCW 34.05.570(3)(c), (d), (e) and (h). DSHS is bound its own rules in the WAC, as well as the laws. WAC 388-02-0220, Deffenbaugh v. DSHS, 53 Wn. App. 868 (1989)].

child's behavior -- for instance, suicide attempts indicate high risk of emotional abuse. (Behar, V, 79, L. Nelson, XIV, 14, 15, 17, 25, Carlton, XVII, 32, 33, 37)

29 Children's Administration Practices And Procedures Guide, 2332.D25

The Administrative Procedure Act, RCW 34.05, and WAC 388-02 provides due process through numerous procedural safeguards against arbitrary and improper government action, among other things, hearing before an unbiased ALJ, the right to present evidence and argument and to know the government's evidence, the right to have a decision based only on the evidence presented, statement of the reasons for the decision, and the right to judicial review. Ongom v. DSHS, 124 Wn. App. 935, 946 (2005), citations omitted. DSHS violated so many provisions in the RCW and the WACs the decision can only be arbitrary and capricious, as superior court concluded:

DSHS violated RCW 34.05.464 and WAC 388-02-0600 by failing to show deference to the ALJ's opportunity to observe the witnesses. RCW 34.05.464, WAC 388-02-0600. This is not optional; the statute says "shall." RCW 34.05.464.

DSHS misinterpreted RCW 34.05.461(4) and WAC 388-02-0215(4) to usurp the authority of the ALJ because the ALJ didn't record demeanor of many witnesses. RCW 34.05.461 does not require the ALJ to record the demeanor of witnesses, nor of a specific number of witnesses. RCW 34.05.461 requires the ALJ to identify findings based substantially on credibility of evidence or demeanor of witnesses. RCW 34.05.461(4).

The ALJ properly recorded his observations on the credibility of the evidence over 4 pages. AR 0237-0240.

DSHS violated WAC 388-02-0215(4), WAC 388-02-0600, WAC 388-02-0220, 388-02-0390, 388-02-0490 , 388-02-0400, 388-02-0425, 388-02-0470, 388-02-0475 by deciding the credibility of the evidence, and making findings on the DSHS view of the evidence.³⁰ It is the ALJ who is the fact-finder, the trier-of-fact, and the DSHS review judge does not have this authority unless presiding at the hearing. WAC 388-02-0215(4) DSHS reliance on the Tapper case is misplaced: Tapper was not governed by DSHS hearing rules. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397 (1993). It is the sole province of the trier of fact to pass on the weight and credibility of evidence. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980) (questions of credibility are for trier of fact and are not overturned on appeal); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (trier of fact's function is to weigh persuasiveness of evidence). *Boeing Co. v. Heidy*, 147 Wn.2d 78 (2002)

DSHS violated RCW 34.05.464(5) by finding facts based solely on DSHS evidence, and ignoring the rest of the record, and WAC 388-02-

³⁰ In counsel's notes from the Superior Court hearing on 3/4/05, DSHS did not dispute that the ALJ has the sole power to determine the weight and credibility of the evidence. DSHS has not provided the transcript of this hearing.

0600(2)(e) by adding the new finding that Ms. Costanich had threatened Frank, as it is inconsistent with the ALJ's decision.

The DSHS review of facts is with the substantial evidence standard. DSHS violated WAC 388-02-0600(2)(b). The DSHS review judge must accept the ALJ's findings of fact unless they were not supported by substantial evidence in light of the entire record. WAC 388-02-0600(2). The review judge stated he did a de novo review of the facts. AR 0079 The substantial evidence test does not require that DSHS was persuaded of the correctness of the ALJ's order. It does not matter that DSHS would have likely have ruled differently had it been the trier of fact. The only question is whether any fair-minded person could have ruled as the ALJ did after considering all of the evidence. The substantial evidence standard does not permit DSHS to substitute its judgment for that of the trier of fact on the credibility of witnesses or the weight to be given to conflicting evidence. Callecod v. Wash. State Patrol, 84 Wn. App. 663, 676 (Wash. Ct. App. 1997) The ALJ is the trier-of-fact, the impartial professional judge who hears the evidence. The ALJ explained the reasoning for his decision, and the evidence was substantial, disputed only by inference or by DSHS hearsay. The ALJ relied upon all of the direct evidence.³¹ AR 0230, 0232,

³¹ At the hearing, the allegation was that Ms. Swore "at" children by calling them names, saying "F...you," etc. There was no dispute that she swore, or that she used

0238, 0246. This is substantial evidence by any means, and the reviewing court's view of the facts does not matter. Callecod v. Wash. State Patrol, at 673.

There may be confusion about what "swearing at children" meant at the administrative hearing: the DSHS's allegations were that she called them profane names and directly swore at them to demean and humiliate them. DSHS did not object to using profanity in sentences to the children, and agreed that those words could only be evaluated in context. (Duron, XII, 118, 180, 181, Dorsey, XIX, 189) Superior court may not have noticed this distinction when it noted that it disagreed with the ALJ's finding on this, but agreed that her swearing would not have been a basis to revoke her license.

DSHS violated RCW 45.05.461(4) by making findings based on hearsay and speculation. RCW 34.05.461(4) requires that findings are based exclusively on evidence at the hearing, and also prohibits any findings of fact based on hearsay "*unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence.*" RCW 45.05.461(4). The DSHS Final Decision relies upon speculation about how Frank and Patrick felt,

profanity, sometimes, in statements to the children. This was not the conduct that was allegedly abusive or prohibited by the rules.

and relies upon uncorroborated DSHS hearsay the ALJ found would unduly abridge the parties' right to confront and rebut. (AR 0240)

DSHS misinterpreted WAC 388-02-0401, WAC 388-02-0430, and misrepresented the record by reliance upon Kevin's declaration: The DSHS review judge decided he could rely on Kevin's declaration because Ms. Costanich's stipulation to K's declaration was a waiver to cross-examination. (AR 0003, 0043, 0062). Ms. Costanich stipulated to the admission of Kevin's declaration with the proviso that she would be able to challenge Kevin's credibility through his counselor Mr. Crabb; the ALJ admitted it on that basis. AR 0237, Tr. I, 64, IX, 57, 58. When a party accepts an exhibit he/she is not obligated to agree with its contents, and a party to change or reject a stipulation after it has been made in any case. WAC 388-02-0430, WAC 388-02-0401. In every case, the ALJ is authorized to determine the weight of the evidence, and to give more weight to in-court testimony. WAC 388-02-0425, 0390. This list is not inclusive.

C. Issue 3: Superior Court Did Not Err: The DSHS Findings Are Not Supported By Substantial Evidence But Rely Solely On Uncorroborated Hearsay And Speculation; The Evidence Is That Ms. Costanich Did Not Threaten Frank Or Call Anyone Names, Only That She Swore.

Superior court has already reviewed the entire record and concluded that in any case, the DSHS findings are not supported by

substantial evidence. Superior court did not err. First, the DSHS findings are inherently invalid, as they are improperly based upon the DSHS view of the evidence. Second, DSHS has no authority to base findings on uncorroborated hearsay and speculation.

Third, judicial review of DSHS findings is with the substantial evidence standard. RCW 34.05.570. Under this standard, the reviewing court must view the evidence in a light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." Ongom v. Dep't of Health, supra. It does not matter that the reviewing court is not persuaded by the ALJ, the only question is whether any fair-minded person could have ruled as the ALJ did after considering all of the evidence. The substantial evidence standard does not permit a reviewing court to substitute its judgment for that of the trier of fact on the credibility of witnesses or the weight to be given to conflicting evidence. Callecod v. Wash. State Patrol, 84 Wn. App. 663, 676 (Wash. Ct. App. 1997) For instance, the issue of whether Ms. Costanich swore "at" the children, in light of her admitted use of profanity,

³² may now be now disputed. However, the ALJ found she did not, and he was the one to determine what the allegations were, what exactly DSHS found abusive or prohibited. ³³ There was no evidence that her swearing was abusive, or cruel, or for punishment or discipline. There was substantial evidence for the ALJ's findings, and the review judge could not change this finding. ³⁴ While it may not be clear to the reviewing court what "swearing at" children meant at the administrative hearings, the ALJ was the best one to judge, and superior court properly accepted his view of this fact.

³² It was never disputed that Ms. Costanich used profanity in her own speech, but this was funny, graphic, and not used to call names, belittle, intimidate, or otherwise harm children. . (Hill, III, 131, 162, 184, Carlson, VII, 103, S. McLaughlin, IX, 97, 98, 152, L. Nelson, XIV, 14, Barnes, XIV, 52, Robertson, XIV, 175, Cassaday-Smith, XV, 50, 51, 75, 77, T. McLaughlin, IX, 193, Mayer, XV, 96, Ewy, XII, 130, Yarkowsky, XV, 141, Isley, XV, 200, 231, Carlton, XVII, 31, Minear, XVI, 189, Spier XVII, 64, P 62, Graham, III, 203, Stephenson, IV, 167. Mayer, XV, 118, Patrick, III, 62). The evidence was overwhelming that these children were happy, bonded, caring, thriving. AR In this home, "children learned what it is like to be loved and cared for." (Hill, III, 181).

³³ DSHS did not assert that using profanity on is own, in a statement to a child, was abusive or prohibited, but it depended on context. (Duron, XII, 118, 180, 181) DSHS knew that Ms. Costanich used profanity as a tool and determined this was not abuse or a violation of the licensing rules. (AR 3689) DSHS expert witnesses, and all the professionals testified that language must be evaluated in context. (Dr. Lund, VIII, 14, 115, Dr. Cartwright, IV, 121, Behar, V, 79, Dr. Cowles, VI, 138, Dr. Adler, VI, 202, L. Nelson, XIV, 17, Dr. Carlton, XVII, 32, Dr. Adler, VI, 187). Swearing could be a way to connect, could be therapeutic. (L. Nelson, XV, 14) DSHS social worker Carlton had observed the children's reaction to hearing profanity, and saw that it had no impact. (Carlton, XVII, 37, 45). No one had ever heard Ms. Costanich say the word "c....," and "bitch" was never directed toward the children, but was occasionally used as a term of endearment between the adult women (T. McLaughlin, IX, 17, Casssaday-Smith,)

³⁴ Patrick, when asked a clear question, confirmed that Ms. Costanich didn't call them names, only used swear words in sentences, and not to the girls. (III, 52, 62).

D. Issue 4: DSHS Has Misinterpreted The Law And DSHS Policy To Decide That Ms. Costanich Guilty Of Child Abuse Based On Speculation, Without Any Showing Of Harm, Or Of Risk To The Children, Or Any Signs In The Children's Behavior, Who From All Accounts, Were Not Abused But Were "Thriving."

1 The DSSH review decision misinterpreted the laws and rules governing child abuse and foster care licenses.

DSHS's authority to make child abuse findings against citizens is limited: DSHS is authorized to investigate acts or failures to act that result in "death, serious physical or emotional harm, or sexual abuse or exploitation, or that presents an imminent risk of serious harm." RCW 74.13.031(3). DSHS authorized to find a parent/guardian has abused a child is limited to acts which prove to "be injurious to the child's health, welfare and safety." RCW 26.44.010. The definition of child abuse or neglect is an injury or an act that "evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, and safety..." RCW 26.44.010, RCW 26.44.020(12), (15). Under the WAC, child abuse is "acts which are cruel or inhumane," "engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child." WAC 388-15-130. The statutes and the WAC are not ambiguous, and the courts must give effect to the plain meaning. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). DSHS, at the hearing, argued that child abuse requires a finding

requires a showing of “substantial risk” of injury. (XIX, 13) DSHS misinterpreted the law and the rules in stating that a “mere risk” of injury is child abuse. (AR0058)

Appellant’s reliance on the Morgan case is misplaced. Morgan v. DSHS, 99 Wn. App. 148, review denied 141 Wn. 2d 1014 (2000). As the ALJ noted on page AR 0233, the Morgan case determined that using profanity to address children was a humiliating disciplinary practice, and in that case, there was substantial evidence. AR 0233. Unlike in Morgan, Ms. Costanich did not address the children with profanity, nor did she use profanity as a disciplinary practice, or to humiliate the children; and the only evidence that she did is the DSHS allegations and inference. AR 0238, 0035, 0009, 0041, 0042, 0052.

The DSHS review decision errs in concluding that a child’s behavior is irrelevant to a determination of emotional abuse. AR 0058. Washington law requires a risk assessment method to assess allegations of abuse, and DSHS uses their DSHS Risk Factor Matrix (RFM) to determine the risk of abuse. RCW 26.44.030(13) Emotional abuse is assessed by manifestations in the child’s behavior. Tr. V, 79, XIV, 14, 15, 17, 25, XVII, 32, 33, 37. The DSHS experts and all other professionals concurred, that it is a child’s behavior that is considered in assessing the

risk of emotional abuse. DSHS review judge erred by ignoring this policy.

The DSHS revocation of Ms. Costanich's license is error, because it relies totally on findings unsupported by the evidence. AR 0069-0076). The allegation that she failed to file a written discipline statement, was not alleged in the administrative hearings. AR 0075, The DSHS Final Decision relies entirely upon the DSHS findings of fact, of threats to kill, abuse and name-calling, harsh discipline, as the basis to revoke Ms. Costanich's foster care license. These are unfounded and can not be used as a basis for license revocation. RCW § 74.15.130(2)(a), RCW 26.44.020(19), WAC 388-15-077, WAC 388-15-073 (3). The ALJ determined that Ms. Costanich's use of profanity was not cruel or inhumane, that she did nothing that would support revocation of her license revocation. AR0240-0244, 0246, 0247.

DSHS has erred in finding that Ms. Costanich violated the MLR (the minimum licensing rules, then WAC 388-148. The DSHS Final Decision and relies entirely upon the DSHS view of the evidence, on the DSHS view that Ms. Costanich abused these children.³⁵ AR 0069-0075 First, his findings are unsupportable, and can not be used as a basis for

³⁵ The allegations of improper conduct which constituted violations of the minimum license requirements were based entirely on the CPS allegations, per the DSHS licensing officials (Bulzomi, VII. 122, McKinney, X, 74, X, 114, 176).

license revocation. RCW § 74.15.130(2)(a), RCW 26.44.020(19), WAC 388-15-077, WAC 388-15-073 (3). Second, DSHS alleged in the hearings that Ms. Costanich's licensing was child abuse and that, if not, she violated WAC 388-148-0470, which prohibits discipline that is "cruel, unusual, frightening, unsafe, and humiliating, by her acts of name calling. (XIX, 189). The DSHS licensor testified she relied solely on the CPS reports for her revocation letter, that she had just added in the allegation of humiliation and fear. XI, 58.

The ALJ was obligated to uphold the CPS revocation of Ms. Costanich's foster care license if he had "reasonable cause" to believe that Ms. Costanich had violated the WAC governing foster care license rules, and he did not. WAC 388-148-0470 does not prohibit swearing. The ALJ found only that Ms. Costanich swore, that she did not swear at the children as alleged. AR 0247 DSHS did not allege at the hearings that swearing otherwise is prohibited.³⁶ Ms. Costanich stopped swearing altogether when they asked her to, Tr. X, 34, and she can not now be penalized where she was never informed this was proscribed. Sinnott v. Skagit

³⁶ CPS/DSHS testified to agreement that the nature of profanity in a statement to the child, such as "go to your "fucking room" depends entirely on context. XII, 180

Valley College, 49 Wn. App. 878, 886 (1987). If DSHS wants to now prohibit swearing by foster parents, they will have to change the rules.

2 Superior court did not err in finding that the DSHS review decision is arbitrary and capricious.

A decision is arbitrary or capricious under RCW 34.05.570(3)(i) if it is a "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." Bowers v. Pollution Control Hearings Bd., 103 Wn. App. 587, 596, 13 P.3d 1076 (2000). The DSHS review decision is certainly willful - DSHS knows the scope of their power. DSHS is accountable to know the laws and the rules. The DSHS review judge noted that CPS had not done an investigation. AR 0079. The DSHS review judge found this no challenge to the credibility of CPS, but only said: "*So what?.... the ALJ corrected this error by allowing all of the witnesses to testify. Even if the department improperly considered information, the ALJ corrected this error by ignoring the improper information.*" AR 0079. To then go on to ignore the ALJ's findings, and to ignore the law and the rules, "can only be seen as deliberate, arbitrary and capricious." Superior court did not err in drawing this conclusion.

E. Issue 5: Fees: The Court Should Uphold The Superior Court Fee Award And Grant Ms. Costanich Her Fees On Appeal

1. The Court should uphold the fee award

The court reviews the superior court's decision whether to award fees and costs under the Equal Access to Justice Act (RCW 4.84.350(1)) under the abuse of discretion standard. An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Cobra Roofing Serv. v. Dep't of Labor & Indus., 122 Wn. App. 402, 97 P.3d 17 (2004). Superior court determined that the DSHS Final Decision was deliberate, arbitrary, and capricious, that their pursuit of their findings was unjustified. The court should affirm the fee award.

2. The court should grant Ms. Costanich fees and costs on appeal

RAP 14.2 provides for costs to the prevailing party. RAP 18.1 provides for reasonable attorney fees if a party is entitled to them under applicable law. Fees are available to Ms. Costanich under RCW 4.84.350. Fees are also appropriate under RAP 18.1 which provides for having to defend against a frivolous appeal. Both courts which are not DSHS have ruled against DSHS; the evidence is not disputed that the children in her home were "thriving;" the evidence is not disputed that DSHS ignored the ALJ; the evidence is not disputed that DSHS relied upon speculation and

its own uncorroborated hearsay. The court should find this appeal is frivolous.

VII. CONCLUSION

The DSHS review was in gross violation of the law and contrary to the evidence. It is outside its review authority, it is unlawful procedure and decision-making, it has erroneously interpreted and applied the law, it is not supported by substantial evidence, it is inconsistent with DSHS rules, it is arbitrary and capricious. The reviewing court must grant relief from this decision under RCW 34.05.070(3)(b)(c)(d)(e)(h)(i). Superior court did not err. The court should affirm the superior court decision.

“Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” Offutt v. United States, 348 U.S. 11, 14 [349 U.S. 133, 137] Quasi-judicial hearings, as this one was, must be conducted so as to give the appearance of fairness and impartiality. OPAL v. Adams County, 128 Wn.2d 869, 889 (Wash. 1996). It is the ALJ who is the impartial decision maker in these hearings. The ALJ is the fair decision maker in administrative hearings. The use of the ALJ, the professional judicial officer, “lessens the influence of the agency seeking

discipline and tends to ensure independent and unbiased judgment.”

Ongom, 947. This court should additionally find that DSHS has violated Ms. Costanich’s fundamental right to a fair hearing. RCW 34.05.570(3)(a).

The Court should affirm the superior court decisions and award fees to Ms. Costanich.

Respectfully submitted this April 8th, 2006



Carol Farr
WSBA #27470
Attorney for Kathie Costanich

LIST OF APPENDICES

- A More background on this home.
- B Overview of th 49 witnesses at administrative hearing.
- C Idenitification of fact and expert witnesses and relation to children.
- D AR 3471, declaration of S. Duron, as submitted to the Superior Court.
- E Graphic overview of Laws and WAC governing Review of Administrative Orders

APPENDIX A

BACKGROUND ON THE HOME

This appendix is a summary of references to the record on the background of this home. It is impossible to summarize 19 days of testimony. This is to show that the record supports the statements in the brief.

1. Ms. Costanich's home was a unique resource for the most damaged children, "unsurpassed by any foster home in the state."

Kathie Costanich and her husband Ken provided a home for foster children for over 25 years. They were a resource for very difficult children, unparalleled in Washington, per the DSHS assessment, from 2000: "The family provides a unique and valuable resource to our region. Her experience, expertise, commitment and involvement is unsurpassed by any foster home in the state." (AR 3522)

Per the DSHS placement coordinator, Kathie was "on a pedestal. She was clamored after. People would sneak around behind my back to make placements in her home, instead of going through me. She got calls from all over the state to take children." (DSHS' Spier, XVII, 51, 56.) Dr. Cowles, psychologist at of Children's Hospital, testified "From my point of view and my experience with her, she's one of the best foster parents I've ever worked with." (Tr. VI, 132)

2. The Costaniches took in the most difficult children, sexually aggressive and violent boys and special needs children.

Kathie and her husband, Ken, took on the neediest, most difficult kids and did remarkable things with them. (DSHS' Spier, XVII, 50, DSHS' Carlton, XVII, 29). They took in children who were violent, sexually active, with very difficult behaviors. (DSHS' Spier, XVII, 50). They took children no one else would take. (DSHS' Hunter, XVI, 64) They took children straight out of Fairfax hospital, with so many horrendous behaviors that 99% of foster parents would not attempt to handle them. (DSHS' Spier, XVII, 50). They took in infants who were "vegetables" who became developmentally appropriate. (DSHS' Mayer, XVII, 29). They had 6 or more children, children with grave problems, disabled children. (DSHS Mayer, XV, 85). For the last 13 years, Kathie focused on taking very disturbed teen-aged boys, violent boys, boys labeled sexually aggressive youth (SAY) and had a mix of such boys with other difficult children, drug affected infants, medically fragile infants. (Costanich, I, 75, Cassaday, XV, 53). They did an excellent job with special needs kids, kinds that other homes could not manage. (Sachs, V, 24).

3. The children were amazingly successful in this home.

CASA Diane Isley, who had many children placed in this home for over 10 years, testified that these were the most difficult children, but they had a tremendous success rate in this home, that they way the children responded to Ms. Costanich was "amazing."

(Isley, XV, 207). DSHS social worker Mayers, who had been close with this family for 20 years, she saw children come into this home with huge problems, with no self-esteem, suicidal, homicidal, failing in every way, and they would change, they would progress, stay in school, learn to ride the bus, develop friendships, participate in sports, develop self-esteem and a sense of competence and self-worth. (Mayer, XV, 106, 107).

There were marvelous changes, amazing growth in the children. (Ewy, XIII, 125, Isley, VI, 206). Children came in uncontrollable, inconsolable, and they emerged with life skills. (DSHS' Carlton, XVII, 33). Kathie did an incredible job of making kids feel safe. (DSHS' L. Nelson, XIV, 7). Kathie had a vast amount of knowledge. (Graham, III, 219). They treated all children as their own. (CASA Yarkowsky, XV, 133). Former foster children called and visited (DSHS' Carlson, VII, 103). The home was loving, nurturing, structured. (Robertson, XIV, 136, Carlson, VII, 100). In this home, "they love you; they love you, that's it." (Robertson, XIV, 136)

4. Ms. Costanich was president of FPAWS (Foster Parent Association of Washington State and is a life-long advocate for foster children and foster parents rights.

Kathie is a life-long vocal advocate for foster and was president of FPAWS when this started. (I, 171) She was a a trainer for DSHS for over 10 years, teaching social workers and foster parents. She has written DSHS training manuals, focused on how to minimize damage caused to children by the foster care system (Mayer, XV, 111). She was a mentor to foster parents, helped them with their children and with their problems with CPS and DSHS; she set up and ran Kent foster parents support group. (Spier, XVII, 56) DSHS social workers and foster parents relied upon on her for advice, for support, for help. (L. Nelson, XIV, 13, Ewy, XII, 124, 127, Mayer, XV, 87, Carlton, XVII, 28). The DSHS foster parent placement coordinator avowed that as a foster parent, Ms. Costanich was "beyond compare." (Spier, XVII, 56)

5. The Costaniches took in the most difficult children, sexually aggressive and violent boys and special needs children.

Kathie and her husband, Ken, took on the neediest, most difficult kids and did remarkable things with them. (DSHS' Spier, XVII, 50, DSHS' Carlton, XVII, 29). They took in children who were violent, sexually active, with very difficult behaviors. (DSHS' Spier, XVII, 50). They took children no one else would take. (DSHS' Hunter, XVI, 64) They took children straight out of Fairfax hospital, with so many horrendous behaviors that 99% of foster parents would not attempt to handle them. (DSHS' Spier, XVII, 50). They took in infants who were "vegetables" who became developmentally appropriate. (DSHS' Mayer, XVII, 29). They had 6 or more children, children with grave problems, disabled children. (DSHS Mayer, XV, 85). For the last 13 years, Kathie focused on taking very disturbed teen-aged boys, violent boys, boys labeled sexually aggressive youth (SAY) and had a mix of such boys with other difficult children, drug affected infants, medically fragile infants. (Costanich, I, 75, Cassaday, XV, 53). They did an excellent job with special needs kids, kinds that other homes could not manage. (Sachs, V, 24).

6. The children were amazingly successful in this home.

CASA Diane Isley, who had many children placed in this home for over 10 years, testified that these were the most difficult children, but they had a tremendous success rate in this home, that they way the children responded to Ms. Costanich was "amazing." (Isley, XV, 207). DSHS social worker Mayers, who had been close with this family for 20 years, she saw children come into this home with huge problems, with no self-esteem, suicidal, homicidal, failing in every way, and they would change, they would progress, stay in school, learn to ride the bus, develop friendships, participate in sports, develop self-esteem and a sense of competence and self-worth. (Mayer, XV, 106, 107).

There were marvelous changes, amazing growth in the children. (Ewy, XIII, 125, Isley, VI, 206). Children came in uncontrollable, inconsolable, and they emerged with life skills. (DSHS' Carlton, SVII, 33). Kathie did an incredible job of making kids feel safe. (DSHS' L. Nelson, XIV, 7). Kathie had a vast amount of knowledge. (Graham, III, 219). They treated all children as their own. (CASA Yarkowsky, XV, 133). Former foster children called and visited (DSHS' Carlson, VII, 103). The home was loving, nurturing, structured. (Robertson, XIV, 136, Carlson, VII, 100). Per aide Rosetta Robertson, "they love you, they love you, that's it." (Robertson, XIV, 136). Ms. Costanich was "beyond compare" to any other foster parent, per the DSHS placement coordinator testified that as a foster parent, Ms. Costanich was "beyond compare." (DSHS' Spier, XVII, 56)

Costanich
Administrative
Appeal

WITNESS OVERVIEW

Kathie Costanich
Ken Costanich

Frank (18) - anger
Kevin (16) - SAY
John (14) - SAY, dd
Patrick (10) - SAY
Elizabeth (9) - since 6 months
Barbara (5) - since 4 days

* quoted, misrepresented

Aides in the Home

Crystal Hill*
Sarah McClaughlin*
Tori McClaughlin*
Sara Cassaday/Smith
Rosetta Robertson
Angela Barnes
Sondra Carlson

CASAs

Ed Yarkosky – John
Diane Isley* – Frank

Other DSHS Social Workers

Laurie Mayer – DSHS
Teresa Sachs – DSHS
Larry Nelson – DSHS
Anita Speir – DSHS
Wendi Carlton, Ph.D – DSHS
Steve Schuetz – DSHS
Terry Gibson – DSHS

Children

J
P

Children's Doctors/Counselors

Richard Crabb – Kevin
Francis Mark Froes – Kevin
Dr. Chris Cowles – John
Dr. Rich Adler – John
Shawn S. Brown – Patrick
Dr. H. Bartlett Vincent – girls

Teachers/School Staff

Birgitta Glass
Christine Oplund
Jeff Chamberlain

FIRST/FPAWS

Larry Stephenson
Ruth Graham

FOSTER PARENT/AUNT

Sandra Minear* – foster aunt
Donna Ewy* – foster parent

Expert on FAS/FAE

Carolyn Hartness

Foster Parents

Kathie Costanich
Ken Costanich

Children's Social Workers

Amy Acroyd – Frank
Michael Behar – Kevin
G. Hetherington – John
Darren Thames – Patrick
Shiela Hunter – girls
Jackie Wilson – girls
Edie Nelson – Supervisor

DLR/CPS/DSHS -investigation

Sandra Duron
Ingrid McKinny
Jim Bulzomi
Beverly Payne
Kyle Smith

Experts for DSHS

Dr. Cartwright
Dr. Lund

APPENDIX B

Identificaton of the Fact and Expert witnesses

This list identifies the fact and expert witnesses from the administrative hearings.

These witnesses are listed on AR 0224 and identified below, with some references to the transcripts of their testimony.

FACT WITNESSES

FOSTER PARENTS

- 1) Kathie Costanich – foster mother/guardian. (I , II, XVII)
- 2) Ken Costanich – foster father/guardian, stay-at-home dad (XVII)

CHILDREN'S DOCTORS/THERAPISTS

- 3) Dr. H. B. Vincent, psychiatrist to B and E (IV, 34), who testified that the alleged swearing was not in the realm of damaging children, even if it was directed to the children, that were no signs of abuse, and the girls would be permanently emotionally damaged if they were to be removed. (IV, 41, 76, 77, 69).
- 4) Dr. C. Cowles, from Children's Hospital, psychologist to J for 6 years (VI, 126), testified that J became completely stabilized in the home, was functioning the best he had ever seen, J was happy, bonded, that he was highly opposed to removing J, that if there was emotional abuse there would be signs, that J would have been falling apart, that Ms. Costanich was the best foster mother he had seen (Cowles, VI, 127, 136).
- 5) Dr. R. Adler, forensic psychiatrist from Children's Hospital, psychiatrist to J (VI, 167), testified that one could not make a "knee jerk" reaction to these allegations, the alleged acts were not emotional abuse, that abuse is a clinical judgment, that the effects of language depends on context and if the children were abused this would manifest in the children's functioning. (VI, 186,200, 202).
- 6) R. Crabb, K's mental health therapist (IX, 16) worked with K for 6 years, had made home visits, testified that K was not abused, that K wanted to remain in the home, this was the best foster home K had ever had, K had been a very troubled youth but K had made significant emotional growth with the Costaniches, K's self-esteem improved significantly, his wish to succeed, his self confidence, his ability to change and improve himself improved significantly, that K had increased self-esteem, that K was bonded to Kathie and cared for his little sisters, that Kathie was very good at helping K, that K was not always truthful, that he questioned K's motive for making the original allegations, that K had said Kathie had a "potty mouth." (Crabb IX, 16, 34, 37, 55, 63, 66)
- 7) S. Brown, licensed mental health counselor for 15 + years, evaluated P in several

sessions over two months (XIV, 103 – 117), testified that P was comfortable and happy, he felt listened to, that the alleged acts were unlikely to have occurred, that P loved Ms. C and wanted to stay there, that Kathie's swearing was part of her language, effect on children would depend on context. (Brown XIV, 103).

AIDES IN THE HOME DURING THIS TIME PERIOD

- 8) Crystal Hill, knew the family 7 years, worked summers, lived and worked full time in the home in 2000, filled in at other times, volunteered on her days off. (Hill, II, 120, 121, 126).
- 9) Sarah McClaughlin, knew the family 12 years, has a sister adopted from Costaniches, worked as an aide 20-25 hours per week in 2001, summer 40 hours per week, hung out there the rest of the time, is LDS/Mormon. (S McLaughlin, IX, 91, 93, 94, 98).
- 10) Tori McClaughlin, knew the family 13 years, aide on occasion since 2001, worked 20-40 hours in the summer of 2001. (T. McLaughlin, IX, 158, 159, 160, 199).
- 11) Sara Cassaday-Smith, occasional aide, knew the Costaniches her entire life, 27 years, practically grew up there, Ms. Costanich was her baby-sitter, she went camping with the family, and now has a bi-racial son who plays there frequently. (Smith, XV, 70, 80)
- 12) Rosetta Robertson, known family since 1997, there almost every day for dinner, worked 3 pm to 9 pm, 6 hours per day, 7 days a week either working or visiting. Testified that in this home they love you, love you. (Robertson, XIV, 166,167)
- 13) Angela Barnes, grew up with the Costanich family, lived up the street, was an aide in 2000-2001, worked Sundays 8 hours, other days 6 hours. (Barnes, XVI, 46, 48).
- 14) Sondra Carlson, known since 1998, lived in the home on various occasions, worked in 2001 5-6 hours per day, 10 hours weekends. (Carlson, VII, 99, 100-102).

DSHS SOCIAL WORKERS & OTHERS WITH CLOSE TIES TO THE FAMILY

- 15) L. Mayer, DSHS social worker for 20 years, knew this family since 1994, was close with this family, spent "hundreds of hours" in the home, went camping with the family. (Mayer, XV, 84, 85, 88, 95, 110)
- 16) W. Carlton, Ph.D., DSHS social worker and mental health counselor, has had 10 clients in the Costanich home, turned to Kathie for help with her own daughter. (Carlton, XVII, 26, 27, 38, 45)
- 17) Donna Ewy, foster parent, family friend for 8 years, her son plays with B at the Costanich home frequently, for a while every week, has been camping with the family. (Ewy, XIII, 124, 125, 155, 133, 157).
- 18) S. Minear, foster aunt, watched Kathie raise foster children for 18 years; the foster children are part of their big, close family. (Minear, XVI, 182, 212)

CHILDREN'S CASAS/GUARDIANS AD LITEM

- 19) Ed Yarkosky, CASA to J, was in the home every week for the last 6 years to visit J. (Yarkowsky, XV, 141, 143, 167)
- 20) Diane Isley, CASA to K for 12 years, had had 10 children/cases in the Costanich home over the last 10 years, who did extremely well (Isely, 190,192).

CHILDREN'S TEACHERS/SCHOOL COUNSELORS

- 21) Jeff Chamberlin, B's case manager at ChildHaven, did home visits (XV)
- 22) Christine Oplund, E's teacher, had known E five years. (XIII)
- 23) Brigitta Glass, E's school counselor, had known E five years, and had no knowledge of any interview of E. (XVII)

CHILDREN

- 24) John, aged then 15, SAY, had been in the home for 6 years. (II)
- 25) Patrick, aged then 10, had been in the home a short while. (III)

CHILDREN'S SOCIAL WORKERS

- 26) Sheila Hunter, DSHS social worker for B and E until DSHS transferred their case. (XVI)
- 27) E. Nelson, DSHS, Hunter's supervisor until DHS transferred the case. (XVI)
- 28) Amy Acroyd, social worker for F. (III)
- 29) Michael Behar, DSHS social worker for K. (V)
- 30) Darren Thames, DSHS social worker for P. (III)
- 31) Jackie Wilson, social worker for B and E after transfer. (III)
- 32) George Heatherington, social worker for J (II)

DSHS SOCIAL WORKERS/MANAGERS, FOSTER PARENT LIASONS

- 33) Anita Spier, DSHS placement coordinator for Kent, known Kathie since 1997, has recommended Kathie's home for over 50 children, testified that Kathie is "beyond compare" with any other foster parent. (Spier, XVIII, 50, 56).
- 34) Teresa Sachs, DSHS social worker, worked with Kathie since 1999 (VI, 7)
- 35) L. Nelson, DSHS social worker, trained with Kathie, had children in her home earlier. (XVII)

- 36) R. Graham, FPAWS¹, worked with Kathie on foster parent retention programs, at meeting when DSHS asked Kathie to forego appealing finding of abuse in trade for keeping girls. (III)
- 37) L. Stephenson, FPAWS, worked with Kathie on foster parent retention programs, at meeting when DSHS asked Kathie to forego appealing finding of abuse in trade for keeping girls. (IV)

EXPERT WITNESSES

- 38) Dr. Cartwright, psychologist hired by DSHS; had never met the children or Kathie, had reviewed documents provided by CPS, testified that the alleged conduct could pose a risk to the children's self-esteem, that there would be manifestations of abuse in the children's behavior, that evaluations would be necessary, in-depth interviews with children and collaterals, that she could only speculate. (IV, 88, 82, 114, 118, 120, 123, 136, 138, 200)
- 39) Dr. Lund, psychologist hired by DSHS; had never met the children or Kathie, had reviewed documents provided by CPS, the effect of the alleged conduct would depend on the individual, hard to know without information about the children and the impact at the time. (Lund, VII, 118).
- 40) Carolyn Hartness, expert on fetal alcohol syndrome/effect. (XVIII)

¹ FPAWS is the Foster Parents's Association of Washington State

APPENDIX D

This declaration of S. Duron, AR 02347, was submitted to the Superior Court judge for the judicial review, as marked with references to testimony in transcripts from the administrative hearing. This was reviewed by the Superior Court, filed as an exhibit to the pleading "Memo to the Court" of June 22, 2005.

10-1

RECEIVED
KING COUNTY, WASHINGTON

MAR 28 2002

DEPARTMENT OF
JUDICIAL ADMINISTRATION

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING
JUVENILE DEPARTMENT

IN RE DEPENDENCY OF:

ELIZABETH NICK (dob 8/07/92)
BARBARA NICK (dob 5/08/97)

NO. 93-7-00216-3 SEA
97-7-01447-4 SEA

Minor Children.

DECLARATION OF SANDY DURON

(Clerk's Action Required)

SANDY DURON declares as follows:

1. I am a Division of Licensed Resources (DLR) CPS investigator. My duties include investigation of referrals alleging child abuse and/or neglect in a licensed facility, such as a foster home or day care.

2. Over the course of several weeks in the summer and fall of 2001, I investigated allegations of physical and emotional abuse of Elizabeth Nick, Barbara Nick and other children in the foster home of George and Kathie Costanich.

3. I reviewed numerous documents, including the history of CPS referrals received regarding the home, DCFS records involving the children in the home, licensing compliance agreement, written supervision plans and psychiatric and treatment records regarding the children in the home.

DECLARATION OF SANDY DURON
Rev. 04/01 pp

1

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-7744

Ms. Duron
denied
knowledge of
this motion
at all
(XII, 175)

but then
recanted and
admitted
this was
her declaration
in support
of the
motion
(XII, 175-180)

003470

16

D-2

4. I interviewed numerous people having information relating to the referrals, including the children in the home, several DCFS social workers who are or have been assigned to case management of these children, the foster parents, foster parent aides who worked in the home in 2001, psychologist Beverly Cartwright, two licensors of the home, several family friends and two therapists who worked with children placed in the home.

5. The children in the home reported that Ms. Costanich called them names, such as "fuckers." The children reported the following words and phrases used by Ms. Costanich toward the children: "Fuck you, go to your fucken room, get your black ass down to your room, shit, bullshit, fucker, asshole, fucken bitch, cunt and do it over, you lazy nigger." The children were interviewed separately, but their reports were consistent.

6. An aide who worked in the home reported that Ms. Costanich frequently called the Nick child a "fucking cunt, and bitch." The aide stated that the child already does not like herself and thinks she is fat and when she is called "a fucking cunt and fucking bitch" by the guardian it really hurts her.

7. Another aide reported that she thought Ms. Costanich was a good foster parent. This aide confirmed that Ms. Costanich used profanity in the home, including the words "fuck," "bitch" and "little bitch."

8. When interviewed, Ms. Costanich admitted using the word "fuck" "all the time."

* Beverly Cartwright had no interaction with any child - her only contact was Sandra Daron (Cartwright, IV, 88)

DECLARATION OF SANDY DURON
Rev. 04/01 pp

2

ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-7744

0034711

Misrepresented
CASA Isley who
did not say this
(Isley XV, 211, 231,
Duron XI, 179)

9. An experienced CASA reported having heard Ms. Costanich frequently use profanity toward the children in the home. This CASA also stated that even though Ms. Costanich swears a lot, she offers stability to the children in her home.

10. The result of my investigation was a determination that Ms. Costanich uses profanity, name-calling and derogatory racial terms as means to discipline and intimidate the children. The allegation of emotional abuse was determined to be founded.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6 day of March, 2002, at 11:20 am

Sandra Duron
(Signature)
Print Name Sandra Duron

DECLARATION OF SANDY DURON
Rev. 1/01 pp

3

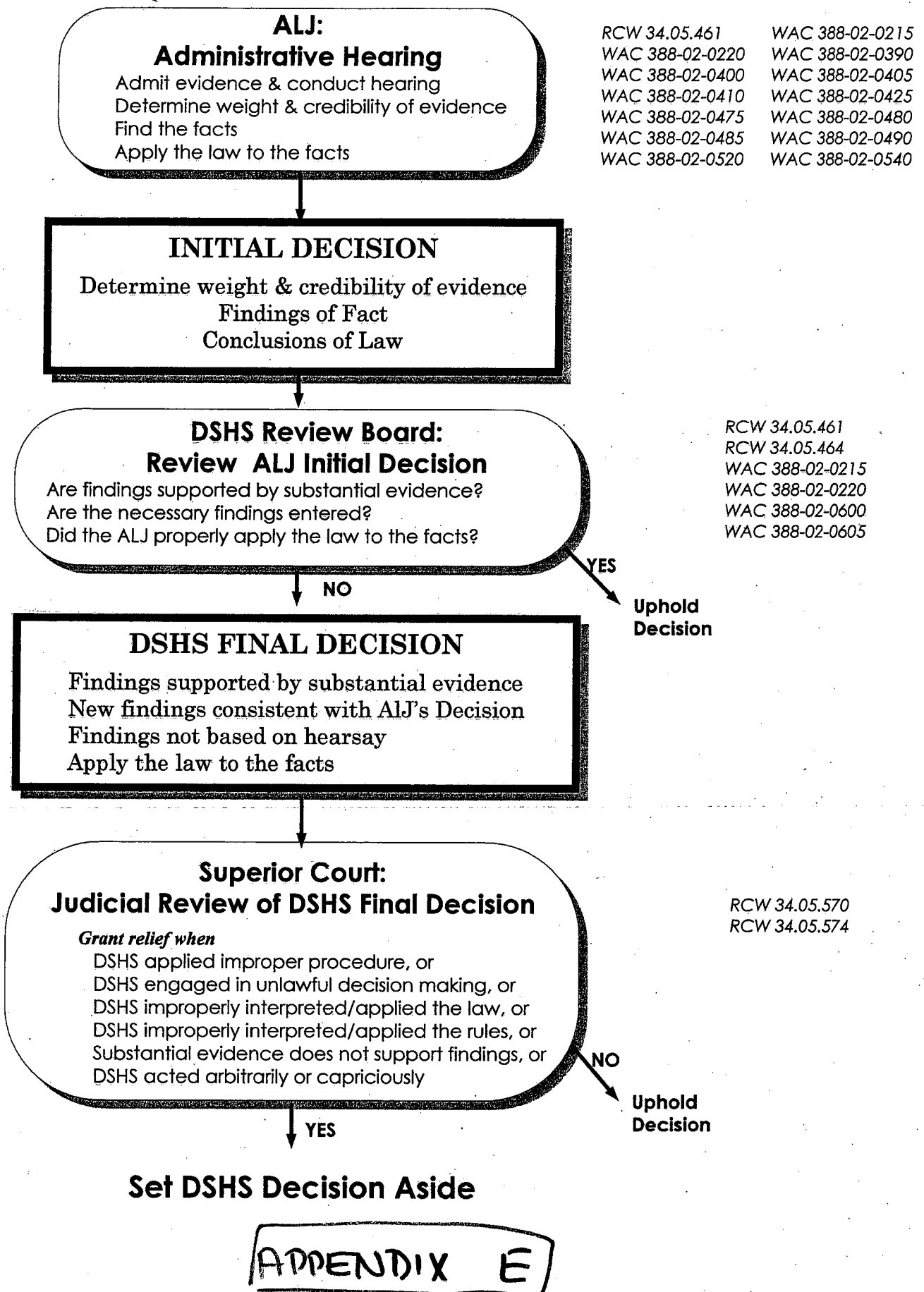
ATTORNEY GENERAL OF WASHINGTON
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-7744

003472

D-4

Evidence
DSHS Allegations

Review of Administrative Decisions



Court of Appeals # 57214-8-1

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

Kathie Costanich, Respondent

v.

State of Washington, DSHS,
Appellant


Court of Appeals # 57214-8-1
Superior Court # 04-2-23203-1 KNT

DECLARATION OF SERVICE

I, Elizabeth Blake, legal assistant for Carol Farr, hereby certify that I sent a copy of the following document to Michael Collins, attorney for appellant, at Office of Attorney General, 900 Fourth Avenue, Suite 2000, Seattle, WA 98164, by legal messenger: (1) This Declaration of Service, and (2) Respondent's BRIEF OF RESPONDENT

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

Dated this April 10, 2006, at Renton Washington.


Elizabeth Blake

2006 APR 10 PM 4:28

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

LEONARD W. MOEN & ASSOCIATES
1107 S.W. Grady Way, Suite 100
Renton, WA 98055-1217
425-227-4260 FAX 425-227-5140